Dr Amir Hussein bin Baharuddin v Universiti Sains Malaysia

HIGH COURT (PENANG) - ORIGINATING MOTION NO 25-34-89
EDGAR JOSEPH JR J
23 JUNE 1989

Administrative Law - Leave to apply for order of certiorari - Applicant not reappointed dean of department by vice-chancellor - Principles governing ex parte application for leave to apply for judicial review - Whether refusal of vice-chancellor to exercise statutory power of reappointment amenable to order of certiorari - Policy of university's Constitution - Role of vice-chancellor - Whether eligibility for reappointment confers an entitlement to be reappointed - Whether arguable that applicant had a legitimate expectation of being reappointed - Principles governing doctrine of legitimate expectation - Court's reluctance to interfere in domestic affairs and internal management of a university

Words and Phrases - 'Eligible'

The applicant joined the University Sains Malaysia as a lecturer in the School of Social Science on 9 September 1975. He was made an associate professor on 1 August 1981. By a letter dated 29 May 1985, the applicant was appointed dean of the School for the period from 1 December 1984 to 31 May 1985 and was thereafter reappointed for two consecutive one-year terms ending on 31 May 1989. By a letter dated 3 May 1989, the vice-chancellor indicated his decision not to reappoint the applicant. The applicant then applied to court for leave to apply for an order of certiorari to quash the decision of the vice-chancellor. The court exercised its discretion whether to grant leave by hearing both the applicant and the respondent in open court.

Held, dismissing the application:

(1) Under O 53 r 3, the court exercises a discretion whether to grant leave to apply for judicial review. The court, in doing so, looks only at the ex parte application and is concerned to see whether prima facie there is a genuine case for review. Having regard to the importance and novelty of the issues raised, the court heard the applicant and respondent in open court. The test in an application for leave is whether the applicant has an arguable case for review, a sufficient interest and whether there has been undue delay.

(2) In considering the application, the court has to determine two matters. First, the policy of the university's Constitution and the powers and duties created by it to give effect to that policy. Second, whether on the facts the body under review had carried out the policy in the manner prescribed. If it had, the court could not interfere with the decision reached unless it was so unreasonable that no reasonable body of persons or person could have reached that decision. The court can only determine whether that body has acted lawfully in the manner prescribed by its Constitution.

(3) Under s 9(1) and (2) of the university's Constitution, the vice- chancellor's duty is to appoint a dean to each school of the university. A dean shall be appointed for a period not exceeding two years but shall be eligible for reappointment, under s 18(6) of the Constitution. 'Eligible' as applied to selection of persons simply means 'legally qualified' or 'fit to be chosen'.

(4) The question of law in these circumstances is whether the refusal of the vice-chancellor to exercise his statutory power of reappointment pursuant to s 18(6) of the university's Constitution, reappointing the applicant dean could arguably be amenable to the order of certiorari.

(5) Eligibility for appointment does not confer upon the applicant an entitlement to that appointment. Further, the appointment as dean could not relate to his contract of service with the respondent university. His appointment, consequently, under s 18(3), could not carry any trace of security of tenure. There was no question therefore of his rights or interests being affected by the refusal to appoint him dean.

(6) The next question was whether it was arguable that the applicant had a legitimate expectation of being reappointed dean. If so, it would be arguable that he should have been given the opportunity of making representations.

(7) The closest the courts have come to explaining the idea of 'legitimacy' is that the expectation must be reasonable, although reference has also been made to 'well-founded', 'settled', 'natural' or 'real'. Reasonableness connotes that the expectation must be objectively justified - a subjective hope is not enough. However, in the *Council of Civil Service Union* case,[13] the use of the word reasonable has been discouraged, chiefly because some expectations, although they might well be entertained by reasonable persons, will not necessarily have consequences to which effect will be given in public law. Further, the possibility that there may be some reasonable expectations which are not 'legitimate', has emerged with the extension of the concept of legitimate expectation into areas, other than procedural fairness, for example, standing to bring an application for judicial review.

(8) In the area of employment, the concept is elusive where used in relation to the expectation of promotion. The reluctance of courts to interfere in all matters concerning the domestic affairs and internal management of a university stems from the enthusiasm for the jurisdiction of the university visitor, equivalent in Malaysia to that of vice-chancellor. English courts have asserted the exclusivity of the university visitor's jurisdiction and have even enlarged it. In the present case, the question of reappointment of the dean by the vice-chancellor under s 18 was exclusively a domestic matter involving academic judgment, to be resolved internally.

(9) The applicant did not suffer an economic loss, social stigma, difficulty in securing future employment or dislocation as a result of the vice-chancellor's decision. In such circumstances the applicant had no more than a pious 'hope' of being reappointed. Thus, no requirement of an opportunity to be heard in answer to the charges was involved. It was accordingly manifestly clear that the issues arising in the application were not justiciable and the court has no jurisdiction to grant the relief sought.

Cases referred to

1 *R* v *Inland Revenue Commissioners, ex p National Federation of Self-Employed and Small Businesses* [1982] AC 617 (folld)
2 *R* v *Secretary of State for the Environment, ex p London Borough Brent Council* [1982] QB 593 (refd)
3 *Chief Constable of the North Wales Police* v *Evans* [1982] 1 WLR 1155 (folld)
4 *Baker* v *Lee* [1860] 8 HL Cas 495; 11 ER 522 (refd)
5 *Moriss* v *Winter* [1930] 1 KB 243 (refd)
6 *Schmidt* v *Secretary of State for Home Affairs* [1969] 2 Ch 149 (refd)
7 *Attorney General (Hong Kong)* v *Ng Yuen Shiu* [1983] 2 AC 629 (refd)
8 *Salemi* v *Mackellar (No 2)* (1977) 137 CLR 396 (refd)
9 *R* v *Liverpool Corporation, ex p Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299 (refd)

10 *FAI Insurances Ltd* v *Winneke* [1982] 151 CLR 342 (refd)
11 *Barbaro* v *Minister for Immigration and Ethnic Affairs* [1982] 46 ALR 123 (refd)
12 *McInnes* v *Onslow-Fane* [1978] 1 WLR 1520 (folld)
13 *Council of Civil Service Unions* v *Minister for the Civil Service* [1985] AC 374 (refd)
14 *Re Findlay* [1985] AC 318 (refd)
15 *Hamblin* v *Duffy (No 2)* [1981] 37 ALR 297 (refd)
16 *R* v *Trent Regional Health Authority, ex p Jones* (1986) The Times, 19 June 342 (refd)
17 *Patel* v *University of Bradford Senate* [1978] 1 WLR 1488 (folld)
18 *Glynn* v *Keele University* [1971] 1 WLR 487 (folld)
19 *Paterson* v *Dunedin City Council* (1981) 2 NZLR 619 (folld)
20 *Cinnamond* v *BAA* [1980] 1 WLR 582 (refd)

Darshan Singh (*Gurnam Singh* with him) for the applicant.
NG Sivanandan for the respondent.

Cur Adv Vult

Edgar Joseph Jr J: The applicant, Dr Amir Hussin bin Baharuddin, an associate professor of the Faculty of Social Science at the respondent university had applied for leave to apply for an order of certiorari to remove into this court for the purpose of it being quashed the decision of the vice-chancellor of the respondent university made in exercise of his powers under its constitution contained in a letter dated 3 May 1989, refusing to renew the applicant's term as dean of its Department of Social Science.

I would, at this point, interpolate to mention that although the application before me was for leave to commence certiorari proceedings, the appropriate relief which ought to have been sought should have been for leave to commence certiorari proceedings to quash the decision refusing to reappoint him and mandamus proceedings requiring the vice-chancellor to reappoint him as such pursuant to the provisions of s 18(6) of the Constitution. However, in the view I took of the matter, this point was without significance.

I approach this application by reminding myself that under O 53 r 3, the court exercises discretion whether to grant leave to apply for judicial review. The court is here first looking only at the ex parte application and is concerned to see whether prima facie there is a genuine case for review. The principles upon which the court should act are set out in *R* v *Inland Revenue Commissioners, ex p National Federation of Self-Employed and Small Businesses*[1] by Lord Diplock as follows:

> If, on a quick perusal of the material then available, the court (that is the judge who first considers the application for leave) thinks that it discloses what might on further consideration turn out to be arguable case in favour of granting to the applicant the relief claimed, it ought in the exercise of a judicial discretion, to give him leave to apply for that relief. The discretion which the court is exercising at this stage is not the same as that which it is called upon to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application.

In the present case, having regard to the importance and novelty of the issues raised, I had in the exercise of my discretion, heard not only the applicant but also the respondent in open court. (See *R* v *IRC, ex p National Federation of Self-Employed and Small Businesses*[1] at p 642 F per Lord Diplock). It is true that by agreement, the oral ex parte hearing may be waived and the first application treated as the application for judicial review itself thus resulting in a saving of time and costs. (See eg *R* v *Secretary of State for the Environment, ex p London Borough Brent Council*[2] at p 642). But there was neither such agreement nor an order to treat the application for leave as the application for judicial review.

Be that as it may, whether the applicant alone or both parties, are heard, in an application for leave, the threshold test is the same: Does the applicant have an arguable case for review, a sufficient interest and has there been undue delay? I had, in the course of the hearing, to remind counsel more than once, to keep the first of these points in the forefront of their minds because of the somewhat emotive arguments addressed to me as though the application were at a full hearing after leave granted.

The essential facts fall within a short compass and may be stated thus. The applicant commenced employment with the respondent university as a lecturer in the School of Social Science as from 9 September 1975; his scheme of service comprising three grades, namely, lecturer, associate professor and professor. On 1 August 1981 the applicant attained the post of associate professor, a post he holds to the present day. The applicant had been appointed a deputy dean to the School of Social Sciences from 1 November 1976 to 15 January 1977 and there after reappointed from time to time until 31 May 1980, by the then vice-chancellor of the respondent university.

Some four years later, by a letter dated 29 May 1985 the present vice-chancellor of the respondent university had appointed the applicant dean to the School of Social Sciences for the period from 1 December 1984 to 31 May 1985 and thereafter had reappointed him for two consecutive one-year terms ending on 31 May 1989. However, by the letter dated 3 May 1989, addressed to the applicant, the vice-chancellor had intimated his decision not to reappoint the applicant and hence this application.

I would add that the affidavit of the vice-chancellor Datuk Haji Musa bin Mohamad affirmed to on 6 June 1989 (exh 12) showed that the applicant has been a staff member of the respondent university since 1975 and so must have been aware that vice-chancellors of the university had in the past appointed deputy deans and deans to the various schools of the respondent university from time to time without regard to seniority so long as they had been lecturers or associate professors or professors and that such persons had not, as a matter of course been reap-

pointed as such. In support, various examples were cited in the affidavit.

The affidavit went on to traverse the applicant's claim that he had been informed by the vice-chancellor of the respondent university that he would be reappointed dean upon expiry of his term, unless there was cause to the contrary. In the view I took of the legal position which I shall be dealing with shortly - I found it unnecessary - and indeed it would have been wrong - to resolve this conflict of evidence at this stage.

One other point appearing in the affidavit evidence deserves mention. The applicant had himself admitted that he had whilst a member of the staff of the respondent university engaged in business (see cl 3 para 5) although he maintained that this was with 'the permission' of the respondent university. However, it was alleged by the vice-chancellor in his affidavit affirmed to on 16 June 1989 (encl 12), and not challenged by the applicant, that such permission was by r 5 of the University Sains Malaysia (Discipline of Staff) Rules 1979 ('the Rules') required to be given expressly in writing by the vice-chancellor upon application made in a prescribed form and that the applicant had not even made such application much less been given such permission.

Now, in considering the application before me, I had to determine the policy of the Constitution and the powers and duties created by it to give effect to that policy. Next, I had to consider whether, on the facts before me the body under review had carried out the policy in the manner prescribed. If it had, I could not interfere with the decision reached whether I agreed with it or not, unless it was so unreasonable that no reasonable body of persons or person could have reached that decision.

The court will not substitute its discretion for that of the body under review but only determines whether that body has acted lawfully in the manner prescribed by the Constitution. As was aptly put by Lord Brightman in *Chief Constable of the North Wales Police Force* v *Evans*[3] at p 1174, judicial review 'is not an appeal from a decision, but a review of the manner in which the decision was made'.

Having made these general observations, it would be convenient if at this point I mentioned the role of the vice-chancellor so far as is relevant to the present application. He is appointed by the Yang di Pertuan Agong and is the principal executive and academic officer of the university (see s 9(1) and (2) of the Constitution). It is his duty to appoint a dean to each school of the university. (See s 9(1) and (2) of the Constitution). A dean shall be appointed for a period not exceeding two years but shall be *eligible* for reappointment. (See s 18(6) of the Constitution; emphasis supplied). By 'eligible', as applied to the selection of persons, means simply 'legally qualified' or 'fit to be chosen' (per Lord Chelmsford in *Baker* v *Lee*[4]). So, it has been held that a provision in the Prison Rules that prisoners are in certain conditions 'eligible for remission' does not create a legal right to remission. (See *Morriss* v *Winter*[5]).

In these circumstances, the question of law central to this application is whether the refusal of the vice-chancellor to exercise his statutory power of reappointment pursuant to the provisions of s 18(6) of the Constitution, reappointing the applicant the dean could arguably be amenable to the prerogative order of certiorari.

Clearly, the applicant was eligible for reappointment as dean and, indeed, there was no dispute on this score. However, the fact that he was eligible as such could, in no way, confer upon him an entitlement to that appointment. Moreover, his appointment as dean could in no way relate to his contract of service with the respondent university. Consequently, his appointment as dean under s 18(3) of the Constitution could not possibly carry with it any traces of security of tenure. There was no question therefore of his rights or interests being affected by the refusal to appoint him dean.

The more difficult question was whether it was arguable that the applicant had a legitimate expectation of being reappointed dean. If so, it would be arguable that he should have been given the opportunity of making representations (see *Schmidt* v *Secretary of State for Home Affairs*[6] at p 170 and *Attorney General of Hong Kong* v *Ng Yuen Shiu*[7]).

However, to qualify as an expectation which attracts procedural protection, it must be 'legitimate'. The closest the courts have come to explaining the idea of legitimacy is that the expectation must be reasonable. The epithet most frequently used by the courts as a substitute for 'legitimate' is 'reasonable' (see *AG of Hong Kong* v *Ng Yuen Shiu*[7] at p 637), although reference has also been made to 'well founded' (*Salemi* v *MacKellar (No 2)*[8] at p 439 per Stephen J), 'settled' (*R* v *Liverpool Corporation; ex p Liverpool Taxi Fleet Operators' Association*[9] at p 304 per Denning MR), 'natural' (*FAI Insurances Ltd* v *Winneke*[10] at p 348 per Gibbs CJ) or 'real' (*Barbaro* v *Minister for Immigration and Ethnic Affairs*[11] at p 130 per Smitthers J).

'Reasonableness' connotes that the expectation must be objectively justified. A subjective hope is therefore not enough (see *McInnes* v *Onslow-Fane*[12] at pp 1529-30). However, its use has been discouraged recently by the House of Lords (see *Council of Civil Service Unions* v *Minister for the Civil Service*[13] per Lord Fraser, Lord Diplock and Lord Roskill). The chief reason advanced being that some expectations, although they might well be entertained by reasonable persons will not necessarily have consequences to which effect will be given in public law (at pp 408-409 per Lord Diplock). Furthermore, the

possibility that there may be some reasonable expectations which are not 'legitimate' has emerged with the extension of the concept of legitimate expectation into areas other than procedural fairness; for example, standing to bring an application for judicial review (see *Re Findlay*,[14] a case on parole policy).

Now, in the area of employment, the concept of legitimate expectation is elusive at least where used in relation to the expectation of promotion (see *Hamblin* v *Duffy (No 2)*[15] at p 304). Indeed, it has been held that the decision of a health authority not to appoint to the post of consultant orthopaedic surgeon a candidate recommended by the advisory appointment committee was not justiciable at all and so not susceptible of judicial review (see *R* v *Trent Regional Health Authority, ex p Jones*[16]).

More to the point, the reluctance of courts to interfere in all matters concerning the domestic affairs and internal management of a university stems from their enthusiasm for the jurisdiction of the university visitor (equivalent in this country to that of vice-chancellor) in such matters (see *Patel* v *University of Bradford Senate*[17] at pp 1499-1500). The English courts have continued to assert the exclusivity of the university visitor's jurisdiction (*Glynn* v *Keele University*[18]), and even to enlarge it (*Patel's* case[17]).

Thus, in the present case, the question whether the applicant should have been reappointed dean following the expiry of his term, by the vice-chancellor pursuant to the powers conferred by s 18 of the Constitution was exclusively a domestic matter involving academic judgment, to be resolved internally. No economic loss, social stigma, difficulty in securing future employment or dislocation was involved in the vice-chancellor's decision declining to reappoint the applicant dean. In such circumstances, I regarded the applicant as having no more than a pious 'hope' of being reappointed dean; 'nothing was being taken away, and in all normal circumstances there are no charges, and so no requirement of an opportunity of being heard in answer to the charges' (see *McInnes* v *Onslow-Fane*[12] at pp 1529-30) and also, *Paterson* v *Dunedin City Council*[19] where the width of the discretion defeated any legitimate expectation).

Accordingly, it was manifestly clear that the issues arising upon this application were not justiciable and so this court had no jurisdiction to grant the relief sought therein.

By way of postlude, I would add that I had considered the question whether if, contrary to my primary opinion, the applicant had a legitimate expectation of a hearing, his alleged previous misconduct hereinbefore mentioned, might be relevant. So, for example, in *Cinnamond* v *BAA*[20] misconduct on the part of hire-car drivers absolved the relevant public authority from observing natural justice when banning the drivers from operating at the airport. Brandon LJ in that case made it clear that no prejudice was suffered by the plaintiffs by the lack of a hearing, as the opportunity 'would have availed (them) nothing'. But, at the end of the day, I did not think it would have been fair to place any reliance on this particular ground considering that the application before me was only for leave. I accordingly wholly disregarded it when arriving at my decision.

In all the circumstances, the application was dismissed and with costs.

Application dismissed.

Solicitors: *Darshan Singh & Co; Presgrave & Matthews.*

Reported by *Zarinah Marican*

Saw Gaik Beow v Cheong Yew Weng & Ors

HIGH COURT (PENANG) - CIVIL SUIT NO 571 OF 1978
EDGAR JOSEPH JR J
6 JUNE 1989

Agency - Whether authority given for the execution of agreement - Evidence of circumstances

Contract - Sale and purchase agreement - Undue influence - Whether party was under undue influence - Circumstances surrounding the transaction - Contracts Act 1974, s 16

Civil Procedure - Limitation - Title to land - Accrual of cause of action - Clear and unequivocal threat to infringe right - When cause of action arose - Limitation Act, ss 6 & 9

Land Law - Sale and purchase agreement - Undue influence - Whether party was under undue influence - Circumstances surrounding the transaction - Contracts Act 1974, s 16

The plaintiff was a purchaser of a property and sued for specific performance of an agreement of sale and purchase contained in and constituted by a memorandum in writing by the first defendant. The registered proprietors were in fact the second and third defendants who are the son and daughter of the first defendant. The first defendant admitted that he signed the agreement but alleged that he did not give free consent as he was exposed to influence from the plaintiff who was his spiritual adviser. The second and third defendants took the position that they neither knew or approved of the agreement at the time of its execution by the first defendant nor did they subsequently ratify the same.

According to the plaintiff, the first defendant suggested in 1964 to the plaintiff that she buys a house in the town area. He offered to sell her the house and she could pay whenever able. A price of $22,000 was mentioned and she accepted. Subsequently, she together with DW2 (whom she later married) paid the first defendant a sum of $1,700 in the presence of the second and third defendants, and the first defendant acknowledged the same in his own handwriting. Numerous payments were then made by the plaintiff who moved into the house in May 1964, and each